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No. 98-636

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In The

Supreme Court of the United States

October Term, 1998

HONORABLE ALAN K. SILBERSTEIN, et al.,

Petitioners,

v.

KATHLEEN ZWAAN,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

23 year old Kathleen Zwaan received a contract to provide clerical services to the Philadelphia Municipal Court ("PMC"). While so employed, PMC's chief administrator sexually assaulted her. After she went to the police, the administrator committed suicide.

Petitioner Silberstein, PMC's President Judge, terminated Ms. Zwaan's contract and denounced her in the media as a liar and carnal briber of the deceased administrator. Petitioner Silberstein and his assistant, Petitioner Schneider, launched an investigation of Ms. Zwaan's sex life, and Silberstein shared lurid details of her sex life with the media. In her complaint below, Ms. Zwaan has asserted that these actions were taken in retaliation for her having exercised her First Amendment right to seek redress of grievances by reporting the crime to the police.

The late Kevin Murray was PMC's chief administrator. In 1995, Murray wrote to Ms. Zwaan demanding that she produce all of her personal financial records, including copies of her checking account. Ms. Zwaan was unaware of any complaint regarding her performance under the contract.

At 6 p.m. on December 22, 1995, Ms. Zwaan was summoned to Murray's office where they met alone. Murray was drinking alcohol and offered a drink to Ms. Zwaan which she declined. He asked if she had received his letter advising her that her quarterly contract payment was being withheld because she had not produced her financial records. Murray also inquired about checks

she had written which had allegedly bounced,[1] her accounting practices and payments of personal expenses. Murray told her that she could go to prison for misappropriating funds because she was making loans to her family and paying personal expenses with the "state" money that had been paid to her.[2] Believing Murray to be an important public official, Ms. Zwaan feared imprisonment.

Murray repeatedly threatened to call the Philadelphia District Attorney and have her arrested on the spot. Between threats, he demanded that Ms. Zwaan give a reason for him to help her avoid jail. His threats and demands lasted almost one and one-half hours during which she was terrified and crying. Finally, Murray commanded her to take off her clothes. Thoroughly terrified and believing that she would be sent to prison if she did not comply, Ms. Zwaan removed her clothes. Murray stroked her body, put his penis in her mouth and ejaculated.

Ms. Zwaan went home and immediately reported the assault to family, friends and the local rape crisis center.

Though she believed Murray to be a powerful public official who could have her imprisoned, on December 26, 1995, Ms. Zwaan, accompanied by her father, reported the sexual assault to the Philadelphia police. As part of

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[1] Only one check had been returned for insufficient funds, and Ms. Zwaan had immediately given cash to the payee upon learning that the check had not been honored.

[2] These threats were baseless. The "state" money had been paid to Ms. Zwaan pursuant to her contract with PMC. It was her money, and she was free to use it as she saw fit.

their investigation, the police instructed Ms. Zwaan to tell Murray that she needed more time to produce her records. This was to give the police time to obtain legal authorization under Pennsylvania law for a body wire.

On January 11, 1996, police equipped Ms. Zwaan with a recording device and sent her to confront Murray in his office. At that time, pursuant to police instructions, she gave Murray some, but not all, of the requested documents. After quickly reviewing the incomplete records, Murray agreed to release her quarterly contract check the following day. (Her quarterly payment had been withheld pursuant to Murray's instructions.) Ms. Zwaan then accused Murray of the sexual assault. Murray did not deny the charges or defend himself in any way. Instead, he responded by saying that he would get her check immediately.

After this meeting, the police confronted Murray and searched his office.[3] Murray declined to answer their questions and never offered any explanation to police concerning Ms. Zwaan's allegations.

On January 25, 1996, Murray killed himself. Acting at the direction of Petitioner Silberstein, PMC then forwarded several letters demanding the rest of Ms. Zwaan's financial records. One letter, faxed at 6:41 p.m., set 4:00 p.m. on the following day as the "deadline" for

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[3] Though the police found semen stains on Murray's couch and rug, Ms. Zwaan had neither believed nor told police that his semen had contacted these items. Subsequent DNA tests eliminated Murray as the source of these stains.

production. When Ms. Zwaan sought a one day extension, Petitioner Schneider (at Silberstein's direction) wrote back terminating Ms. Zwaan. At that time, Silberstein was quoted in the Philadelphia *Inquirer* as declaring "That's it. She's finished."

Following Ms. Zwaan's termination, Silberstein again spoke with the news media. On February 3, 1996, the Philadelphia *Inquirer* quoted Silberstein as saying "She [Ms. Zwaan] can go peddle her wares somewhere else" and "I don't believe it. I think she made it up and if – the sex act – did happen, she initiated it because she didn't want her contract terminated. My view is whatever happened in that room she had a motive. She was willing to do whatever she had to do to keep her job."

Having terminated and publicly stigmatized Ms. Zwaan, only then did Silberstein initiate his purported investigation of her accusations against Murray. He directed his law clerk and Schneider to interview PMC staff concerning Ms. Zwaan's financial practices and her personal life. Petitioner Schneider, in fact, conducted these interviews.

On February 7, 1996, petitioners interrogated under oath two individuals about Ms. Zwaan's personal life and sexual practices. These interrogations of Anthony Covatta (a former boyfriend) and Patrick O'Neill (Ms. Zwaan's former employer) were conducted in Silberstein's judicial chambers before an official PMC court reporter and Silberstein's law clerk. Petitioners focused these interrogations on Ms. Zwaan's sexual practices, sexual preferences and moral character. They inquired into, *inter alia*, the identities of her sexual partners and whether (a) she

swallowed after performing oral sex, (b) she expressed pleasure about performing sex acts, (c) she would remove her clothes when doing so, (d) she had ever taken money for sex.

For example, petitioners questioned Covatta as follows:

"By Judge Silberstein:

> Q. And as result of this come-on did you ever turn into a relationship with Kathleen [Zwaan] between you and she?
>
> Q. And how many times would you say that she performed oral sex with you?
>
> Q. And of the ten times that she performed oral sex would you say that she initiated it all the time each time?
>
> Q. Did you ever have a conversation with her that she got any sort of pleasure doing this, that this was her preferred method of sex as opposed to straight intercourse so to speak?
>
> Q. As far as you know she was just performing oral sex because she liked to do it?
>
> Q. Do you know if she performed oral sex with anyone else that worked there?
>
> Q. Well, let's go to anyone else that didn't work there that you know?
>
> Q. And when you said her last boyfriend, was that the cop [Pennsylvania State Trooper Stumpf]?
>
> Q. And what's his [the boyfriend's] full name for the record?

Q. During that relationship she performed oral sex on Stumpf, as far as what he told you?

Q. And according to Stumpf what did she want to reel in when she performed this oral sex?

Q. And did he ever say to you while she was performing oral sex on him, or during that period of two year relationship, he had heard she was going with someone else or more or less a permanent relationship?

Q. Was there anyone else that you know that she had sexual relations with?

Q. Let's go back to the hot tub. Who was in the hot tub with her [Ms. Zwaan]? I assume they didn't have any clothes on in the hot tub, right?

Q. If I can just get back to the oral sex. When she was finished performing oral sex would she swallow?

Q. She wasn't a gagger?

Q. Spit it out or anything like that?

Q. So, during the period of time that she performed oral sex you weren't married?

"By Mr. Schneider:

Q. Did Kathy Zwaan ever brag to you about who else she had sex with or performed oral sex upon, or did she saying anything like that?

Q. Do you recall if she [Ms. Zwaan], or do you know if she ever performed oral sex in return for money?

> Q. Okay. Did she ever perform oral sex while she was naked? I mean did she ever take off her clothes first just –
>
> Q. But you also said that she was often in the mood just to do it just for the sake of doing it. Is that –
>
> Q. Did she have any other acts she liked to perform? Is this just one, was this her particular favorite, performing oral sex?

Subsequently, Silberstein permitted a reporter from the Philadelphia *Inquirer* to read the *Covatta* transcript which contained the previously cited references to Ms. Zwaan's sexual preferences, practices and partners. Silberstein also asked the District Attorney of Chester County, Pennsylvania (where Ms. Zwaan lives) for derogatory information about her.

Covatta told Trooper Stumpf (Ms. Zwaan's boyfriend) of his interrogation by petitioners and that Silberstein wanted to question Stumpf about Ms. Zwaan. Covatta also told Stumpf that either Silberstein or Schneider had said that Stumpf would "have no choice" but to cooperate with petitioners' investigation and answer their questions. Trooper Stumpf later told Ms. Zwaan about his discussion with Covatta, and informed her about Covatta's interrogation by petitioners.

Though he now professes to have merely been conducting a legitimate inquiry into the accusations against Murray, Silberstein has testified that he never at any time believed Ms. Zwaan. Moreover, Silberstein never consulted with Ms. Zwaan, her counsel, or the police about the truth or falsity of the allegations against Murray.

Ms. Zwaan sued Silberstein and Schneider for civil rights violations under 42 U.S.C. Sec. 1983 alleging, *inter alia,* retaliation and invasion of privacy.

The District Court denied Silberstein and Schneider's motions for summary judgment based on their asserted defense of qualified immunity. The Third Circuit Court of Appeals affirmed.

REASONS FOR DENYING THE WRIT

1. It is irrelevant to the resolution of this case whether or not the Circuit Courts may have differing standards for evaluating when a right is clearly established. Petitioners' actions were so extreme and the rights asserted by Ms. Zwaan so clearly established that reasonably competent public officials would have known that their conduct was proscribed by law. No further instruction by this Court is needed to make apparent the unlawfulness of petitioners' outrageous behavior.

This Court has held that public officials are not entitled to qualified immunity if the contours of the right allegedly violated are "sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, [citations omitted] but it is to say that in the light of pre-existing law the unlawfulness must be apparent." *Anderson v. Creighton,* 483 U.S. 635, 640 (1987). In *Harlow v. Fitzgerald,* 457 U.S. 800, 819 (1982), this Court held that qualified immunity is defeated not because the officials "in fact

knew" that they were violating the Constitution, but because "reasonably competent public official[s]" who act with certain improper motives "should know the law [proscribes their] conduct."

After learning of the police investigation and Ms. Zwaan's role in it, Silberstein terminated Ms. Zwaan's employment contract, derided her in the press as a liar and carnal briber of Murray, and, with Schneider, convened a two-man grand jury in his judicial chambers to investigate Ms. Zwaan's sex life. Silberstein shared the salacious investigative results with the media. Nevertheless, petitioners improbably assert that, since they took these actions approximately five months before this Court decided *Board of County Commissioners v. Umbehr*, 518 U.S. 668 (1996) and *O'Hare Truck Service v. City of Northlake*, 518 U.S. 712 (1996), they had no way of knowing that Ms. Zwaan, as the holder of a contract with the government, had a clearly established constitutional right to report a crime to the police free from their outrageous vendetta. (Petition p. 10) Thus, they argue in effect that prior to *Umbehr* and *O'Hare*, reasonably competent public officials could have correctly understood that, by contracting with the government, Ms. Zwaan had somehow relinquished her First Amendment rights to report a crime to the police and to seek redress of grievances.

Petitioners argue that they could not have known that their vendetta violated the law because prior to *Umbehr* and *O'Hare*, the termination of a government contract in retaliation for exercising a First Amendment right had not previously been held unlawful. Not only does petitioners' argument contravene the rationale of *Harlow, infra*, it ignores the fact that they did far more

than merely terminate a contract. Nevertheless, they claim that they are victims of "capricious second-guessing" because the Third Circuit merely requires "some but not precise factual correspondence" between the right allegedly violated and the previous case law defining that right. (Petition p. 15) This argument, however, presupposes a putative legitimacy of action and uncertain definition of the rights implicated that simply do not exist here. Under the facts of this case, petitioners' malicious, protracted and carefully planned vendetta does not place them at the fringe of the permissible but, instead, constitutes the most extreme retaliation against Ms. Zwaan for exercising the well-recognized First Amendment rights of all citizens to report crime to the police and to seek redress of grievances. *United Minewc rkers of America, District 12 v. Illinois State Bar Association*, 389 U.S. 217, 222 (1967) (the First Amendment right to petition for redress of grievances has long been recognized as "among the most precious of the liberties safeguarded by the Bill of Rights."); *California Motor Tranpsort Co. v. Trucking, Unlimited*, 404 U.S. 508, 510 (1972) (holding that the Petition Clause of the First Amendment encompasses the right of access to the courts); *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 741 (1983).

No reasonably competent public official could conclude that Ms. Zwaan had forfeited her right to report Murray to the police because she had contracted to provide clerical services to PMC. On the contrary, to a reasonably competent public official, there would be no mystery or confusion as to whether or not he could retaliate against a citizen – even one who holds a contract with the government – for reporting a crime and seeking

redress of grievances. These rights exercised by Ms. Zwaan were clearly established even without the holdings of *Umbehr* and *O'Hare* and regardless of any real or imagined split among the Circuit Courts.

2. By reporting Murray to the police, Ms. Zwaan exercised clearly established First Amendment rights to petition for redress of grievances and free speech. The Third Circuit properly affirmed the District Court's holding that, outside the political patronage context, independent contractors were entitled to the same degree of First Amendment protection as government employees. Since Ms. Zwaan was not a political appointee merely asserting the right to patronage spoils, petitioners had no reasonable basis for concluding that her involvement with the police was not constitutionally protected because of *Horn v. Kean*.

Petitioners contend that, based on the holding in *Horn v. Kean*, 796 F.2d 668 (3d Cir. 1986), they reasonably inferred that Ms. Zwaan, an independent contractor, did not enjoy First Amendment protections to report a crime to the police or to seek redress grievances. (Petition p. 16) However, *Horn* dealt with the right of political appointees to get and keep patronage contracts as motor vehicle agents for the State of New Jersey. Its holding is specifically limited to the political patronage context and deals with the right of political affiliation. It was the balancing of patronage concerns against First Amendment rights that caused the Third Circuit in *Horn* to depart from this Court's general prohibition in *Lefkowitz v. Turley*, 414 U.S. 70 (1973) which expressly rejects any difference of constitutional magnitude between the threat of job loss to an

employee of the State, and a threat of loss of contracts to a contractor.

Unlike the motor vehicle agents in *Horn*, Ms. Zwaan was not a political affiliate merely asserting her right to keep a piece of the patronage pie. On the contrary, her retaliation claim is premised on her fundamental constitutional rights to report a crime to the police and to seek redress of grievances. Similarly, petitioners' retaliation went far beyond merely terminating her contract. Thus, citing *Lefkowitz, infra*, the District Court properly denied petitioners' summary judgment motion and held that, outside the political patronage context, independent contractors and government employees enjoyed the same First Amendment protections. (District Court Memorandum and Order, p. 3)

Petitioners' citation of *Horn* is but another illogical effort to create the illusion that reasonably competent public officials could think it proper to retaliate against an independent contractor for reporting a crime to the police. No rational interpretation of *Horn* supports such a conclusion.

3. Contrary to petitioners' claim, this Court has declared the existence of a constitutional right to privacy.

In a separate count of her complaint, Ms. Zwaan asserts that petitioners violated her constitutional right to privacy. Petitioners contend that the Circuit Courts have found the contours of the constitutional right to privacy to be unclear and that the District of Columbia Circuit Court even doubts the existence of such a right. (Petition

p. 20) On this basis, petitioners illogically conclude that this Court has never declared the existence of a constitutionally protected right to privacy. Petitioners' conclusion, however, flies in the face of ample authority. *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977) ("The cases sometimes characterized as protecting 'privacy' have in fact involved at least two different kinds of interests. One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions.") In *Griswold v. Connecticut*, 381 U.S. 479, 483 (1965), this Court said, "(T)he First Amendment has a penumbra where privacy is protected from governmental intrusion." See also *Stanley v. Georgia*, 394 U.S. 557 (1969); *California Bankers Assn. v. Shultz*, 416 U.S. 21, 79 (1974) (Douglas, J., dissenting); id., at 78 (Powell, J., concurring); *Roe v. Wade*, 410 U.S. 113 (1973); *Doe v. Bolton*, 410 U.S. 179 (1973); *Loving v. Virginia*, 388 U.S. 1 (1967); *Griswold v. Connecticut*, 381 U.S. 479 (1967); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Allgeyer v. Louisiana*, 165 U.S. 578 (1897). In *Paul v. Davis*, 424 U.S. 693, 713 (1976) this Court characterized these decisions as dealing with "matters relating to marriage, procreation, contraception, family relationships, and child rearing and education. In these areas, it has been held that there are limitations on the States' power to substantively regulate conduct."

Ms. Zwaan's sex life fits well within the parameters of the constitutional privacy right declared in the foregoing case law, and petitioners' unwarranted investigation of her sexual preferences, practices and partners violated her constitutional right to privacy.

4. Petitioners' claim that they did not violate Ms. Zwaan's privacy glosses over and grossly mis-characterizes abundant evidence to the contrary. The court below properly held that, given the record in discovery, Ms. Zwaan is entitled to prove at trial her version of the disputed factual issues underlying her claim for invasion of privacy.

Petitioners baldly assert that they did not invade Ms. Zwaan's privacy but, rather, conducted a legitimate inquiry into her "startling accusations against Murray" which merely touched on her sex life. (Petition p. 28) They make the patently silly argument that they are entitled to summary judgment because their investigation of Ms. Zwaan's sex life and the sharing of their pornographic findings with the media was a legitimate exercise of governmental power that did not invade her privacy. More importantly, they fail to address the basis on which the District Court denied their motion, i.e., that "disputed factual issues" existed as to the legitimacy of their actions, and, accordingly, Ms. Zwaan is "entitled to prove her version of these disputed factual issues" to a jury. (District Court's Memorandum and Opinion, p. 4) Thus, the District Court properly denied their motion for summary judgment. Fed. R.C.P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986).

In addition, the District Court's conclusion that the legitimacy of petitioners' actions was in dispute is amply supported by the record. In this regard, petitioners conducted anything but a legitimate inquiry into matters that were of proper concern to the administration of PMC. On the contrary, the record demonstrates that petitioners' investigation was a witch-hunt and gross invasion of Ms.

Zwaan's privacy that plumbed the depths of salaciousness in an effort to humiliate, degrade, embarrass and destroy her. In this regard, Silberstein has admitted that in the course of his "legitimate" investigation he:

> a. Never contacted police to learn what they had uncovered concerning Murray's actions;
>
> b. Never spoke or consulted with Ms. Zwaan or her counsel about her allegations;
>
> c. Never believed Ms. Zwaan's allegations about Murray;
>
> d. By the time he interrogated Covatta and O'Neill, he had already denounced her in the media as a liar who had tried to use sex to keep her job;
>
> e. Interrogated Covatta under oath about Ms. Zwaan's sexual practices and partners;
>
> f. Shared the *Covatta* transcript with the media;
>
> g. Interrogated O'Neill, a former employer of Ms. Zwaan, under oath about whether or not he had an affair with her or she had "come on" to him.
>
> h. Contacted the District Attorney of Chester County (where Ms. Zwaan lived) for derogatory information about Ms. Zwaan.
>
> i. Had Schneider question Ms. Zwaan's co-workers about her style of dress and sexual behavior.

In contrast, petitioners can cite no actions taken to investigate Murray, whom Silberstein had already decided was telling the truth.

The record overwhelmingly contradicts petitioners' claim that they did not invade Ms. Zwaan's privacy but simply investigated the truth of her accusations against Murray. In the face of this contradictory evidence, they are compelled to doggedly insist that they had a legitimate governmental purpose in investigating the identities of Ms. Zwaan's sexual partners, whether she expressed pleasure at performing sex acts, what kind of sex acts she liked, whether she performed sex for money, whether she performed sex acts with no clothes, whether she swallowed after performing oral sex and in sharing the answers to these questions with the media. In short, petitioners' actions and own words in their transcribed interrogations literally shout their improper motives in invading Ms. Zwaan's privacy to gain personal embarrassing information with which to humiliate, degrade, punish and intimidate her.

CONCLUSION

The record below establishes that petitioners were not engaged in conduct that they as public officials could conceivably have believed was reasonable. Put another way, how could petitioners under any circumstances reasonably believe that their actions were a justified and proper use of governmental power that did not implicate Ms. Zwaan's basic First Amendment rights? The evidence underlines again and again that, because she reported Murray to the police, petitioners set out to destroy Ms. Zwaan by terminating her contract, denouncing her in the media, and invading her privacy to humiliate, degrade, punish and intimidate her. And they used their

governmental offices and authority to accomplish their improper ends. Accordingly, the District Court properly denied petitioners' claim of qualified immunity, and the Third Circuit properly affirmed.

Respondent respectfully requests that the Petition for Certiorari be denied.

Respectfully submitted,

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